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IN THE

Supreme Court of the United States

October Term 1950

No. 568

BERT TAUNAH and PEAWIFEAH TAUNAH, *Petitioners,*

v.

H. C. JONES, Collector of Internal Revenue, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Bert Taunah and Peawifeah Taunah, respectfully pray for the issuance of a Writ of Certiorari to review the judgment below.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1). The judgment below was rendered January 2, 1951. (R. 68)

OPINIONS BELOW

The District Court did not render a formal opinion but entered Conclusions of Law. (R. 48). Neither the majority nor dissenting opinion of the Court below are reported but may be found in the record at R. 59 and R. 65, respectively.

QUESTION PRESENTED

Whether income derived from restricted allotted lands in Oklahoma, held in trust by the United States for full-blood restricted Comanche Indians, under trust patents which have not yet expired, is subject to Federal income tax.

STATUTES INVOLVED

The pertinent statutes are collected in the Appendix hereto, p. 15-17..

STATEMENT

Stipulated Facts:

The following facts were stipulated by counsel for both sides and found by the District Court (R. 6-14; 46-48):

Petitioners, Bert Taunah and his wife, Peawifeah, are full blood restricted Comanche Indians. (R. 6, 8, 46) Each has an allotment of about 160 acres of restricted lands. (R. 31, 29) Each also owns an interest in other restricted lands inherited from the original allottee. R. 29-31; 35-45) Title to all such lands is held in trust by the United States for each Petitioner. (R. 7-9, 14, 46-47) The original trust patents for these lands were issued to the original allottees by the General Land Office August 25, 1901. (R. 47) The trust period, originally 25 years,

has been extended by Presidential Executive Order (Appendix p. 17) and the extended trust period has not expired. (R. 14, 47) The lands were allotted to, or inherited by Petitioners from original allottees under the provisions of the General Allotment Act of February 8, 1887 (C. 119, 24 Stat. 388, 25 U. S. C. Sec. 331 et seq.) and the Jerome Agreement of 1892 ratified by Congress June 6, 1900. (C. 813, 31 Stat. 672 Sec. 6). (R. 12-13, 47)

During the taxable year 1946 Bert Taunah received $345 agricultural lease income; $360 oil and gas royalty income; $100 oil lease bonus and 40 cents interest, making a total income of $805.40. A deduction of $99 for percentage depletion on the oil and gas royalty income and bonus derived from restricted trust lands resulted in taxable income of $706.40. (R. 11, 47)

During the taxable year 1946 the wife, Peawifeah, received $195.56 agricultural and interest income; $25,239.99 oil and gas rentals and royalties, all of which except $22.46 came from her original allotment. A depletion deduction of 27-½%, or $6,941, was taken on the royalty income from the restricted trust lands resulting in taxable income of $18,494.55. (R. 10-11, 47)

The aggregate taxable income of husband and wife was $19,200.95 resulting in income tax of $3,950.42. (R. 48) Petitioners' income tax return for 1946 was prepared by an employee of the United States at the Southern Plains Agency, Anadarko, Oklahoma. (R. 11, 48) The tax payable on the return, $3,950.42, was deducted January 31, 1947 from Petitioners' individual Indian money accounts which were under the supervision and control of the Secretary of the Interior. (R. 11, 48) None of the above income was paid directly to Petitioners; it was all paid to the Indian Agency which acted for the Secretary of the Interior in deducting the amount of the tax and paying it over to the Collector of Internal Revenue. (R. 11, 48)

On April 26, 1948 Petitioners filed Form 843, a claim for refund, and after the six months waiting period (26 U. S. C. Sec. 3772 (2)) filed the present suit. (R. 4, par. 8)

The District Court for the Western District of Oklahoma gave judgment to Petitioners in the full amount (R. 53) and found the above facts (R. 46-48) which were stipulated by Respondent. (R. 6-14) The United States Court of Appeals for the Tenth Circuit reversed, one judge dissenting. (R. 59)

Basis of Decision of District Court:

In its Conclusions of Law (R. 48) the District Court held that the General Allotment Act of 1887 (25 U. S. C. Sec. 348; Appendix hereto, p. 15) provided that at the end of the trust period the land would be delivered to the allottee or his heirs "free of all charge or incumbrance whatsoever" (R. 48). Likewise the Jerome Agreement (C. 813, 31 Stat. 672, Appendix hereto p. 16) provided that at the end of the trust period the United States would convey the lands to the allottees or their heirs "free from all incumbrances" (R. 49). The trust patents issued to Petitioners (R. 35-45, 49) also provided that "at the expiration of said period the United States will convey * * * to said Indian, or his heirs * * * in fee, discharged of said trust and free of all charge or incumbrance whatsoever." (R. 49; see trust patents R. 35, 37, 39, 40, 42, 43, 45.) The Court pointed to *U. S.* v. *Rickert*, 188 U. S. 432, 438, as indicating that freedom from incumbrance of necessity meant freedom from taxation and that four years after the *Rickert* decision the General Allotment Act was amended (25 U. S. C. Sec. 349) to provide that when the Secretary of the Interior determines an Indian is competent he may issue a patent in fee simple "and thereafter all restrictions as to sale, incumbrance or *taxation* of said land shall be removed". (R. 49) The Court also cited the Act of February 10,

1942, C. 56, Sec. 1, 56 Stat. 87, 25 U. S. C. Sec. 352(c) providing that where the Secretary issued a patent in fee simple without the consent of the allottee and the land became prematurely subject to taxation, the Secretary was authorized to reimburse the allottee for taxes paid by the Indian on the land during the unexpired trust period. (R. 49.) Likewise the Court cited the Act of January 29, 1942 56 Stat. 21-22, wherein Congress tolled the Statute of Limitations to allow refund claims to Indians for Federal income taxes "erroneously or illegally" paid upon "rents, royalties or other gains arising from * * * lands" which "by the terms of said treaty or agreement were exempted from taxation". (R. 50.)

The Court based its decision squarely upon its holding that Congress intended that this allotted land should be free from all tax burdens. (R. 50) It cited *Oklahoma Tax Commission* v. *U. S.*, 319 U. S. 598, 610, which held in the case of Indians of the Five Civilized Tribes that the 160 acres of allotted land were by statute immune from Oklahoma estate taxes although the same opinion held other Indian lands were not. (R. 50) Also it cited *Superintendent* v. *Commissioner of Internal Revenue*, 295 U. S. 418, 420, holding that restricted Indians' *investment* income was taxable and "homesteads only were definitely excluded". (Op. p. 420) *Choteau* v. *Burnet*, 283 U. S. 690, 692 did not deal with individual allotted lands but with shares of general tribal income. (Op. p. 692; R. 50) The Court cited *Carpenter* v. *Shaw*, 280 U. S. 363, wherein this Court held that oil and gas royalties were rights attached to the land[1] (Op. p. 368) and that while statutes conferring tax exemptions were to be strictly construed,

[1] The District Court below held that although royalty income was "income" for Federal income tax purposes, oil and gas royalties "nonetheless are corpus as a matter of general property law and hence it must follow that to tax *this* royalty is to tax the tax-exempt land itself. Cf. *Parker* v. *Riley*, 250 U. S. 66, 70."

just the opposite was the rule as to Indian treaty stipulations (Op. p. 366-367). The Court likewise relied on lower court decisions in *U. S.* v. *Homeratha*, 40 F. (2) 305 and *Pitman* v. *U. S.*, 64 F. (2) 740.[2] (R. 51)

Finally the Court held that the tax exemption, which was protected by the Fifth Amendment (*Choate* v. *Trapp*, 224 U. S. 665, 678) was not given these Indians gratuitously but as a result of "a somewhat coercive bargaining transaction" under which the Indians gave up their vast communal lands.[3] "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation", as this Court said in *Carpenter* v. *Shaw*, 280 U. S. 363, 367. (R. 52) The Court concluded:

> "This is not a question of conferring a tax exemption by implication, but instead, a question of delimiting the proper scope of a tax exemption the existence of which has long been decisively determined. *U. S.* v. *Rickert, supra.*" (R. 52)

Basis of Reversal by Court of Appeals:

The United States Court of Appeals for the Tenth Circuit reversed by a divided Court (Judges Bratton and Huxman), Judge Phillips dissenting. The majority held that Sections Sec. 11, 21-23 of the Internal Revenue Code (26 U. S. C. A. 1946 ed. Sec. 11, 21-23) were broad enough to include income from restricted allotted Indian lands held in trust by the Government (R. 60) and that exemptions from federal taxation could not rest upon implication, citing *The Cherokee Tobacco*, 11 Wall. 616, 620; *U. S. Trust Co.* v. *Helvering*, 307 U. S. 57; and *Oklahoma Tax Com.* v. *U. S.*, 319 U. S. 598. The Court stated the

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[2] To which *Blackbird* v. *Commissioner*, 38 F. (2) 976, might have been added.

[3] Reminding us of the old frontier jibe: "Here's to the Indians, to whom we owe absolutely nothing except the land the United States is located on".

provisions of the General Allotment Act (25 U. S. C. Sec. 331, 348, 349) and the Jerome Agreement, 31 Stat. 676 could be searched in vain for a provision expressly exempting the present Indian lands from taxation. (R. 61) The Court conceded that such lands were immune, under *U. S.* v. *Rickert,* 188 U. S. 432, and other cases, from State *ad valorem* taxes and that no case existed holding that the present lands were subject to Federal income taxes. (R. 62) However the Court held this Court's decision in *Choteau* v. *Burnet,* 283 U. S. 691, charted its course and that what was not expressly exempted was taxable. The Court likewise relied upon *Superintendent* v. *Commissioner,* 295 U. S. 418, *Oklahoma Tax Com.* v. *U. S.,* 319 U. S. 598, and *Landman* v. *Commissioner,* 123 F. (2) 787, as indicating it was "fairly clear" that Congress intended to tax income from restricted allotted Indian lands held in trust. (R. 63, 64)

Basis of Dissenting Opinion (Judge Phillips):

Judge Phillips drew a distinction between *allotted* lands held in trust and *inherited* lands held in trust. The latter he held taxable on the theory that the right to inherit is a mere privilege which the United States can take away. (R. 67) As to the originally allotted lands, he cited *U. S.* v. *Rickert,* 188 U. S. 432, 438, to the effect that if these lands could be taxed, and inferentially sold for taxes, the United States could not fulfill its obligations as trustee or guardian. Cf. *Chouteau* v. *Commissioner,* 38 F. (2) 976. (R. 66-67)

Also, the dissent held that oil and gas being irreplaceable natural resources, had the United States not permitted their removal, it would have been obligated to convey them *in situ* at the end of the trust period. Exchanging them for cash did not destroy the obligation to transfer the land undiminished at the end of the trust period in accordance with the Jerome Agreement, 31

Stat. 676. The dissent held the obligation of the United States to convey the original allotment undiminished at the end of the trust period could not lawfully be changed and that to do so would impair the contract. (R. 67)

SPECIFICATION OF ERRORS TO BE URGED

The white man's contracting circle has left the Comanche only their homesteads, restricted allotted lands held by the United States for the Indians in trust. Income from such lands, including their homestead lands, is by statute and treaty exempt from Federal income tax.

REASONS FOR THE ALLOWANCE OF THE WRIT

1. Whether income from restricted allotted Indian lands held in trust by the United States for incompetent full-blood Comanche allottees or their heirs is subject to Federal income tax is an important question of Federal law which has not yet been but should be decided by this Court. *Superintendent* v. *Commissioner,* 295 U. S. 418, 421 involved investment earnings on *surplus* income; *Choteau* v. *Burnet,* 283 U. S. 691 involved *tribal* income received by Indians already declared competent. Neither is controlling authority here at the Court below admitted. (R. 62) Up until 1947 no effort was made by the Commissioner of Internal Revenue to assess or collect ordinary income taxes. However, in that year, by joint action of the Bureau of Internal Revenue and the Commissioner of Indian Affairs, returns were prepared in the Western Oklahoma Agency and filed with the Collector. The superintendent of the agency paid the taxes involved. (R. 11) The present suit for refund of the tax is a test case authorized by the Commissioner of Indian Affairs. (R. 2) It is ideal for that purpose involving as it does (a) oil and gas income both from lands originally allotted and lands inherited from original allottees, and (b) agricultural and interest income from such lands.

The unsatisfactory result of the case at this time is that the district and circuit judges of the Tenth Circuit are divided two and two on the question of taxability of the income involved. Also, the decision below is binding only in the Tenth Circuit and the Secretary of Interior holds in trust restricted allotted Indian lands located in many States outside that Circuit. Other Federal courts might readily follow the reasoning of such cases as *Homeratha* v. *U. S.*, 40 F. (2) 305, *Blackbird* v. *Commissioner*, 38 F. (2) 976, 977-8, or the dissenting opinion below.[1] Until an authoritative decision by this Court the Indians will be compelled to file thousands of refund claims to protect themselves with resulting burdens on the Bureau of Internal Revenue, the Bureau of Indian Affairs and the Courts.

2. The ultimate question is whether the General Allotment Act, 25 U. S. C. Sec. 347, and the Jerome Agreement, 31 Stat. 672, placed in their proper historic background, exempt the present type of income from income tax. The Act requires conveyance of the land in fee to the Indian or his heirs "discharged of said trust and free of all charge or incumbrance whatsoever." The Jerome Agreement contains similar wording and requires conveyance in fee simple "to the allottees or their heirs, free from all incumbrances."[2] The Court below refused to give these guarantees the construction laid down by this Court in

[1] *Blackbird* v. *Commissioner, supra,* was not overruled in *Superintendent* v. *Commissioner,* 295 U. S. 418, 420, insofar as income from homestead or allotted lands was concerned. This Court simply held that income from *investments* of surplus income was taxable. (See opinion p. 418-9; 421)

[2] As the guarantee of both the Act and the Jerome Agreement covers *heirs* as well as original allottees we are unable to follow the distinction in the dissenting opinion below holding that as to lands *inherited* the door is open to taxation on the theory that the right to inherit is a privilege and may be withdrawn. If the guarantee means what Petitioners claim it does the Government could not legally withdraw the privilege to the extent of taxing the heirs. (Cf. *Choate* v. *Trapp,* 224 U. S. 665)

Carpenter v. *Shaw*, 280 U. S. 363, 367, wherein this Court stated:

> "While, in general, tax exemptions are not to be presumed and statutes conferring them are to be strictly construed (Heiner v. Colonial Trust Co., 275 U. S. 232, 72 L. ed. 256, 48 Sup. Ct. Rep. 65), the contrary is the rule to be applied to tax exemptions secured to the Indians by agreement between them and the national government. Choate v. Trapp, supra (224 U. S. 675, 56 L. ed. 945, 32 Sup. Ct. Rep. 565). Such provisions are to be liberally construed."

Instead of the above rule the Court applied the principle of tax law that exemptions from Federal taxation cannot rest upon implication. There is an obvious conflict between the Court's decision below and this Court's rule of liberal construction of Indian tax exemptions as to *allotted* lands announced in *Carpenter* v. *Shaw*, 280 U. S. 363, 367 and *Choate* v. *Trapp*, 224 U. S. 665, 675.[1]

3. The rule of liberal construction cannot be defeated by the Government's contention below that the meaning of the exemption clauses in the General Allotment Act and the Jerome Agreement was irrelevant as the present tax was a tax on "income" and not on the land itself, citing *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 314-316. This is hardly an answer as it is elementary that an unpaid income tax becomes a lien on the land and hence is certainly a "charge" or an "encumbrance". (Cf. *U. S.* v. *Rickert*, 188 U. S. 432, 438) As to this, the Government answered below that there would never be any unpaid taxes as the Secretary of the Interior, the trustee, would simply debit his ward's restricted account

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[1] In *Oklahoma Tax Com.* v. *U. S.*, 319 U. S. 598, 606, this Court said it had applied the rule against tax exemption by implication to Indians as well as others, citing *Superintendent* v. *Commissioner of Internal Revenue*, 295 U. S. 418, 420. However, the latter case involved investment income from withheld funds and the Court stated "homestead lands only were definitely excluded". (p. 420)

and credit the account of the Collector of Internal Revenue. This makes *vis major*, the accident of guardianship, without regard to its duties, the test of legality. Also it ignores the fact that pursuant to the Government's announced policy as outlined in its own regulations Indian allottees declared competent can make their own leases of restricted trust lands and collect their own rent. (See 25 Code Fed. Reg. Secs. 171.4, 171.2.) Hence tax liens could readily arise.

If as held in *U. S.* v. *Rickert*, 188 U. S. 432, 438, a state tax on restricted allotted Indian lands is invalid because the tax may become a lien and thus prevent the United States conveying the land to the Indian "free of all charge and encumbrance whatsoever" the same should be true of a lien in favor of the Collector of Internal Revenue.

Finally, under Oklahoma law royalty oil and gas brought to the surface impairs and diminishes the fee and constitutes a conversion of the fee *pro tanto* (*Aldridge* v. *Houston Oil Co.*, 118 Okla. 281; 244 Pac. 782, 784; cf. *Parker* v. *Riley*, 250 U. S. 66, 70). In place it is corpus and part of the trust estate. (*U. S.* v. *Noble*, 237 U. S. 74, 80; *Parker* v. *Riley*, 250 U. S. 66, 70; R. 52). Hence any diminution by taxation is an impairment of the land held in trust. The fact that Federal tax laws treat oil and gas royalties as income for tax purposes does not of course mean they are not part of the trust estate under the General Allotment Act. The 27½% tax allowance for depletion is a mere act of legislative grace (*Anderson* v. *Helvering*, 310 U. S. 404, 408, *In re Levy*, 94 P. (2nd) 539); each Congress threatens to repeal it. (4 *Mertens Fed. Inc. Tax*, Sec. 24.06-24.15). Also it is an arbitrary figure and does not pretend to be the exact equivalent in value of the oil and gas. The very *taxes* collected today might equal the entire value of the lands at the time the United States decides to return them to the Indians.

4. The decision below imputes to Congress an inconsistent policy as to tax exemption of restricted allotted Indian lands. In *Oklahoma Tax Commission* v. *U. S.*, 319 U. S. 598, 610, although there was a broad holding of taxability, this Court held that under non-taxable provisions in the Act of May 10, 1928, 45 Stat. 495, C. 517, certain *restricted allotted* lands of the Five Civilized Tribes were immune from Oklahoma estate taxes. Presumably they are likewise immune from Federal income taxes,[1] unless the Government's contention is approved that "income" from allotted lands is taxable even though the land is not. Similar non-taxable provisions covering Indian lands are embraced within the Acts of July 1, 1898, 30 Stat., C. 542; March 1, 1901, 31 Stat. 861, C. 676; June 30, 1902, 32 Stat. 500, C. 1323; April 16, 1906, 34 Stat. 137, C. 1876; April 17, 1937, 50 Stat. 68, C. 108 (319 U. S. 607, footnote 11.) Thus restricted allotted lands of the Five Civilized Tribes and Quapaws covered by the above statutes will go income-tax free as to agricultural income whereas similar Comanche lands will be taxed. While Governmental policy can, of course, vary from tribe to tribe, depending on the degree of civilization and competency attained, or for other reasons, there is no rational basis for discrimination as to Federal income taxes—a discrimination which favors the competent tribes, as distinguished from the less competent. There is no reason why, as a result of varying judicial decision, particular tribes should attain this favored position. The Commissioner of Indian Affairs should not be required to assume the burden of paying certain taxes, and not paying others, until this Court decides the matter.

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[1] At least as to *agricultural* income, mineral income being taxable under Sec. 3 of the Act above cited.

CONCLUSION

It is respectfully submitted the writ should be granted and the judgment below reversed.

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APPENDIX

Statutes Involved

Internal Revenue Code Sec. 11 as amended by Sec. 101(a), Revenue Act of 1945, c. 453, 59 Stat. 556. Normal Tax on Individuals:

"There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax * * *" etc.

Sec. 1, General Allotment Act of February 8, 1887, as amended; 25 U. S. C. Sec. 331:

"In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or Executive order, the President shall be authorized * * * to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian."

Sec. 5, General Allotment Act of February 8, 1887, as amended, 25 U. S. C. Sec. 348:

"Upon the approval of the allotments provided for in Sections 331 to 334, inclusive, and 336 by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in the case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, *discharged of said trust and free of all charge or incumbrance whatsoever: Provided,* That the President of the United States may in any case in his discretion extend the period." (Italics ours)

Sec. 6, General Allotment Act of Feb. 8, 1887, as amended by the Act of May 8, 1906, C. 2348, 34 Stat. 182, 25 U. S. C. Sec. 349:

"At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in Section 348, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: *Provided,* That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of handling his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, *and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed* and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further,* That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States; * * * (Italics ours)

Jerome Agreement, ratified by the Act of June 6, 1900, c. 813, 31 Stat. 672:

"Article V

"When said allotments of land shall have been selected and taken as aforesaid, and approved by the Secretary of the Interior, the titles thereto shall be held in trust for the allottees, respectively, for the period of twenty-five (25) years, in the time and manner and to the extent provided for in the Act of Congress entitled "An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes; approved February 8,

1887, and an act amendatory thereof, approved February 28, 1891.

"And at the expiration of the said period of twenty-five (25) years the titles thereto shall be conveyed in fee simple to the allottees or their heirs, free from all incumbrances."

Executive Order No. 7464, September 30, 1936, 1 Fed. Register Part II, p. 1507:

"By virtue of and pursuant to the authority vested in me by Section 5 of the Act of February 8, 1887, * * * it is ordered that the periods of trust applying to any Indian lands, whether of a tribal or individual status, which, unless extended, will expire December 31, 1936, or during the calendar year 1937, be, and they are hereby extended in each case for a further period of twenty-five years. * * *"

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 568

BERT TAUNAH AND PEAWIFEAH TAUNAH,
PETITIONERS

v.

H. C. JONES, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 46-53) are reported at 90 F. Supp. 459. The majority and the dissenting opinions of the Court of Appeals (R. 59-64, 65-68) are reported at 186 F. 2d 445, 448.

JURISDICTION

The judgment of the Court of Appeals was entered January 2, 1951. (R. 68.) The petition for

a writ of certiorari was filed on February 20, 1951. The jurisdiction of this Court is involved under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether taxpayers, who are full-blood restricted Comanche Indians, are subject to federal income taxes on their income directly derived from their allotted lands.

STATUTES AND EXECUTIVE ORDER INVOLVED

The relevant statutes and Executive Order will be found in the Appendix, *infra,* pp. 13-20.

STATEMENT

The facts found by the District Court are substantially as follows (R. 46-48):

Peawifeah (Flora Taunah), a taxpayer herein, is a full-blood restricted Comanche Indian (with Allotment No. 1929, Individual Indian Account No. P-116). She owns certain restricted Indian land some of which was originally allotted to her and some of which she inherited. Title to this land is held in trust by the United States Government for Peawifeah. (R. 46.)

Bert Taunah (Wauk-We), the other taxpayer herein and husband of Peawifeah, is a full-blood restricted Comanche Indian (with Allotment No. 742, Individual Indian Account No. B-47). He owns certain restricted Indian land some of which was originally allotted to him and some of which he inherited. Title to this land is held in trust

by the United States Government for Bert Taunah. (R. 46-47.)

The original trust patents for the land in question were issued to the allottees by the General Land Office under date of August 25, 1901. The trust period of twenty-five years has been extended by Executive Order, as provided by law, and the extended trust period has not expired. The land was allotted to, or inherited by, the taxpayers under the provisions of the General Allotment Act of 1887 (*infra*, pp. 14-16), and the Jerome Agreement of 1892, ratified by Congress, June 6, 1900 (*infra*, pp. 16-19). (R. 47.)

During the year 1946, Peawifeah received $195.56 agricultural and interest income, and $25,239.99 oil and gas rentals and royalties, all except $22.46 of which came from her original allotment. A deduction for depletion of 27½ per cent, or $6,941, was taken on the royalty income, resulting in a determination of Peawifeah's taxable income for 1946 as $18,494.55. (R. 47.)

During the year 1946, Bert Taunah received $345 agricultural lease income, $360 oil and gas royalty income, $100 oil lease bonus, and 40¢ interest (not in controversy), making a total income of $805.40. A deduction of $99 for percentage depletion on the bonus and royalty income resulted in a determination that Bert Taunah's taxable income was $706.40. (R. 47.)

Thus, the aggregate taxable income received, in

1946, by Peawifeah and Bert Taunah from all sources was $19,200.95. This amount was equally divided between them for income tax purposes; the resulting income tax collected totaled $3,950.42. (R. 47.)

The income tax return for the calendar year 1946 was prepared and filed for taxpayers by a United States Government employee of the Southern Plains Agency, formerly the Western Oklahoma Consolidated Agency and the Kiowa Indian Agency, at Anadarko, Oklahoma. The tax payable under the return was deducted, on January 31, 1947, from taxpayers' individual Indian accounts on deposit with the Treasurer of the United States and under the supervision and control of the Secretary of the Interior, and was credited to the account of United States Collector of Internal Revenue for the District of Oklahoma. (R. 48.)

None of the income involved was paid directly to these taxpayers, but all was paid into the Indian Agency at Anadarko, Oklahoma, and each disbursement therefrom was made under supervision and control of the Department of the Interior. All such restricted funds are held by the United States Government for the sole use and benefit of the individual Indian owner, and all receipts or expenditures for each Indian are credited or charged to his individual account. (R. 48.)

All income involved in this controversy is derived directly from the land which was allotted or

inherited under the provisions of the General Allotment Act of 1887 and the Jerome Agreement. (R. 48.)

The District Court concluded (R. 48-53) that the General Allotment Act and the Jerome Agreement relieved the Indian wards' lands from the burdens of all taxation and that the tax exemption so created covered income derived from the lands. It thus gave judgment for recovery of the 1946 tax paid by these taxpayers. The Court of Appeals, Chief Judge Phillips dissenting, reversed (R. 59-68.)

DISCUSSION

I

In our view, the judgment of the Court of Appeals is clearly correct.

1. It is now settled that Sections 11, 21, and 22 of the Internal Revenue Code (Appendix, *infra,* pp. 13-14) subject to income tax all the income of Indian citizens of the United States, like that of other citizens, unless an exemption from such taxation is definitely expressed in an agreement with the Indians or some Act of Congress dealing with their affairs. *Superintendent* v. *Commissioner,* 295 U.S. 418; *Choteau* v. *Burnet,* 283 U. S. 691; *Oklahoma Tax Comm'n* v. *Texas Co.,* 336 U.S. 342, 353, fn. 21; cf. *Oklahoma Tax Comm'n* v. *United States,* 319 U.S. 598, 606-608. Neither the General Allotment Act of 1887 nor the Jerome Agreement (Appendix, *infra,* pp. 14-19), which are the only

provisions relied on by taxpayers as applicable to the Comanche, contains any specific exemption from taxation. Taxpayers would, however, read an exemption from federal income taxation into the undertaking of the United States to convey the allotted land to the Indian at the end of the trust period discharged of trust and "free of all charge or incumbrance whatsoever". While this provision has been held to prevent the imposition of an *ad valorem* tax on the allotted land by a state because, *inter alia,* such a tax, if unpaid, could be a charge on the land at the end of the trust period (*United States* v. *Rickert,* 188 U.S. 432, 438), the provision does not preclude the imposition of a federal tax on *income* derived from the land. Such a tax could, in no circumstances, be a lien or encumbrance on the land as of the end of the trust period, both because the tax is collectible currently by the United States out of the very income taxed which is held by it in trust for the Indian, and also because, even if the United States failed through oversight to pay itself the tax due on the income in its hands, the United States could, and would, not enforce a lien for the unpaid tax against the land at or after the end of the trust period in the face of its promise to convey the land free of encumbrance at the end of the trust period.[1]

[1] While Indians believed to have sufficient business capacity, knowledge, and experience may be permitted to negotiate leases of restricted land for farming and grazing purposes and to collect the rentals thereon, with the approval of the Superintendent, (25 Code of Federal Regulations (1938 ed.,) Sec-

2. There is also no validity to the taxpayers' contention (Pet. 11) that taxation of the oil and gas royalty income diminishes the value of the land and thus necessarily constitutes a violation of the undertaking of the United States to convey the land at the end of the trust period free of all charges and encumbrances. The production of oil and gas represents partly an income-producing operation and partly the wasting of a capital asset, the oil and gas in place. Like the mining of ores, such production results in a profit, for the oil and gas are worth more extracted and severed than they were worth in the ground. *Stratton's Independence* v. *Howbert,* 231 U.S. 399, 415, 416; *Murphy Oil Co.* v. *Burnet,* 287 U.S. 299; *Burnet* v. *Harmel,* 287 U.S. 103; *Anderson* v. *Helvering,* 310 U.S. 404, 407-408; *Kirby Petroleum Co.* v. *Commissioner,* 326 U.S. 599, 602-603. In determining the profit or income from production for income tax purposes, Congress has, from the beginning of the tax under the Sixteenth Amendment, always provided for a depletion deduction,[2] which is regarded

tions 171.2 and 171.4), the United States would, as stated above, be unable to assert a lien for taxes due on such rentals at the end of the trust period.

An Indian allottee actually declared competent may, in the discretion of the Secretary of the Interior, receive a patent to his allotted lands in fee simple, free of all restrictions. (Act of May 8, 1906, Appendix, *infra,* pp. 19-20.

[2] Sec. II of the Income Tax Act of 1913, c. 16, 38 Stat. 114, 166-181; Secs. 5(a) Eighth and 12(b) Second of the Revenue Act of 1916, c. 463, 39 Stat. 756; Secs. 214 (a)(10) and 234(a)(9) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, and of the Revenue Act of 1921, c. 136, 42 Stat. 227; Secs. 214 (a)(9) and 234(a)(8) of the Revenue Act of 1924, c. 234,

as compensation for the reduction in the mineral content of the land from which the mined product is taken. *Anderson* v. *Helvering, supra,* p. 408; *United States* v. *Ludey,* 274 U.S. 295, 302. Taxpayers in this case were allowed, under Section 23(m), Internal Revenue Code, the 27½% depletion deduction provided by Section 114(b)(3) of the Code with respect to the royalties and bonuses received by them for the taxable year 1946. (R. 47.) Consequently, such part of the royalties and bonuses as represents the proceeds from the conversion of the oil and gas in place, *i.e.,* a part of the land, is actually exempted from income tax. Thus, to the extent that the land has diminished in value through being depleted of the oil and gas in place, the taxpayers, or the Indian Agency for their accounts, have received, and will receive, cash proceeds not reduced by the income tax. In effect, taxpayers receive a part of their lands in cash prior to the expiration of the trust period. This partial performance by the United States of its promise, prior to the date fixed for performance, can hardly be deemed a violation of the promise.

Although the Treasury has several times recommended to Congress that the percentage depletion deduction be eliminated, it has not recommended elimination of a deduction for the actual depletion

43 Stat. 253, and of the Revenue Act of 1926, c. 27, 44 Stat. 9; Secs. 23(l) and (m) and 114(b) of the Revenue Act of 1928, c. 852, 45 Stat. 791, and of the Revenue Act of 1932, c. 209, 47 Stat. 169; Secs. 23(m) and (n) and 114(b) of the Revenue Act of 1934, c. 277, 48 Stat. 680, of the Revenue Act of 1936, c. 690, 49 Stat. 1648, of the Revenue Act of 1938, c. 289, 52 Stat. 447, and of the Internal Revenue Code.

sustained. Congress, of course, has not even adopted the Treasury's recommendation with respect to percentage depletion, and there is certainly no basis for a view that Congress will withdraw completely the right to any depletion deduction whatever. Because oil and gas are fugacious minerals, the amount and value of the oil and gas in place on taxpayers' lands—represented by that extracted and to be extracted in the future under the leases—could never be precisely known. But it cannot be said that the percentage depletion deduction (which is allowable so long as oil or gas is produced and sold irrespective of whether or not the value of the oil and gas in place, or the cost, if any, of the property, has already previously been returned), or depletion allowed on some other basis which Congress might adopt, will not compensate in full for any reduction in value of the land caused by withdrawal of the oil and gas in place, the value of which, as distinguished from their value when brought to the surface and severed for sale, is relatively small.

In any event, as stated above, it cannot be claimed that the 1946 tax, by itself, will diminish the value of the land since taxpayers were actually allowed deductions for depletion on the percentage basis.

3. There is likewise no merit to taxpayers' further assertion (Pet. 12), that the judgment below unwarrantedly imputes to Congress an inconsistent policy with respect to taxation of agricultural

income from restricted allotted lands received by Indians of different tribes. In the first place, taxpayers' assumption that, because part of the restricted allotted lands of the Five Civilized Tribes and the Quapaws are exempted by statute and treaty from all taxation, the agricultural income from such lands is also necessarily exempt from such taxation is not justified. A tax on income derived from land does not amount to a tax on the land itself. *N. Y. ex rel. Cohn* v. *Graves,* 300 U.S. 308, 314-315; *Superintendent* v. *Commissioner,* 295 U.S. 418. Cf. *Oklahoma Tax Comm'n* v. *United States,* 319 U.S. 598, 604-610, and *Landman* v. *Commissioner,* 123 F. 2d 787, 790 (C.A. 10), certiorari denied, 315 U.S. 810. Thus, taxation of the income from allotted lands of a restricted Indian is permitted, even though his lands may be tax exempt. *Superintendent* v. *Commissioner, supra,* wherein *Blackbird* v. *Commissioner,* 38 F. 2d 976 (C.A. 10), embodying a contrary holding, was disapproved. Secondly, the General Allotment Act and the Jerome Agreement have substantially different provisions from those applicable to the Five Civilized Tribes, construed by this Court in *Oklahoma Tax Comm'n* v. *United States, supra.* The provisions involved here—which do not refer at all to exemption from taxation—fully warrant the decision below, even assuming *arguendo* that members of the Five Civilized Tribes might be entitled to a different judgment.

Finally, it should be noted that the judgment in this case, insofar as taxation of the oil royalties and

bonuses is upheld, is entirely consistent with specific provisions authorizing federal (and state) taxation of such income from restricted tax-exempt lands belonging to members of the Five Civilized Tribes. Section 3, Act of May 10, 1928, c. 517, 45 Stat. 495, 496; Act of January 27, 1933, c. 23, 47 Stat. 777. See *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598, 604, fn. 6. It follows, on petitioners' own theory, that Congress did not adopt an "inconsistent policy as to tax exemption of restricted allotted Indian lands" (Pet. 12), and that petitioners' oil and gas income, forming the bulk of their gain (*supra*, pp. 3-4), is clearly taxable.

II

As shown in Part I, the holding of the Court of Appeals is correct. No conflict exists and none is asserted by the taxpayers. However, this action is a test case, instituted with the consent of the United States Commissioner of Indian Affairs, and the proper rule to be followed is of importance to those Indians having income from restricted allotted lands, as well as to the Bureau of Indian Affairs. Only in recent years has the Commissioner of Internal Revenue been collecting an income tax on the direct income of restricted Indians from their allotted lands.

We are informed by the Department of the Interior that about three-quarters of all allotted Indian lands were granted under the General Allotment Act, here involved, and that about two-thirds of the restricted Indians holding allotted

lands hold under that Act. These number between 225,000 and 240,000 persons, and the lands lie in various states west of the Mississippi River, both within and without the jurisdiction of the Court of Appeals for the Tenth Circuit. The administrative officials of the Bureau of Indian Affairs do not feel justified, on the basis of the decision below alone, in paying income taxes on behalf of any of these Indians, except the 1800 members of the Comanche, Kiowa, and Apache tribes, which are the tribes covered by the Jerome Agreement. A ruling by this Court will, of course, have more universal effect, and will preclude the necessity for further litigation. Accordingly, the Department of the Interior is anxious for a determination by this Court.

In these circumstances, the Court may consider that a sufficient basis exists for review at this time. However, if the petition is granted, the Court may also feel warranted in affirming the judgment below without further brief or argument.

Respectfully submitted,

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MARCH, 1951.

APPENDIX

1. Internal Revenue Code:

SEC. 11 [as amended by Section 101(a), Revenue Act of 1945, c. 453, 59 Stat. 556]. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax determined by computing a tentative normal tax of 3 per centum of the amount of the net income in excess of the credits against net income provided in section 25, and by reducing such tentative normal tax by 5 per centum thereof. For alternative tax which may be elected if adjusted gross income is less than $5,000, see Supplement T.

(26 U.S.C. 1946 ed., Sec. 11.)

SEC. 21. NET INCOME.

(a) *Definition.*—"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

* * * * *

(26 U.S.C. 1946 ed., Sec. 21.)

SEC. 22 [as amended by Section 1 of the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574]. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or

instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(26 U.S.C. 1946 ed., Sec. 23.)

2. General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388:

That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof,

to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows: * * *

(25 U.S.C. 1946 ed., Sec. 331.)

Sec. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: * * *

(25 U.S.C. 1946 ed., Sec. 348.)

Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the

respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

(25 U.S.C. 1946 ed., Sec. 349.)

3. Jerome Agreement, ratified by the Act of June 6, 1900, c. 813, 31 Stat. 672:

Sec. 6. Whereas David H. Jerome, Alfred M. Wilson, and Warren G. Sayre, duly appointed Commissioners on the part of the United States, did, on the sixth day of October, eighteen hundred and ninety-two, conclude

an agreement with the Comanche, Kiowa, and Apache tribes of Indians in Oklahoma, formerly a part of the Indian Territory, which said agreement is in the words and figures as follows:

"Articles of agreement made and entered into at Fort Sill, in the Indian Territory, on the twenty-first day of October, eighteen hundred and ninety-two, by and between David H. Jerome, Alfred M. Wilson, and Warren G. Sayre, Commissioners on the part of the United States, and the Comanche, Kiowa, and Apache tribes of Indians in the Indian Territory.

"ARTICLE I

"Subject to the allotment of land, in severalty to the individual members of the Comanche, Kiowa, and Apache tribes of Indians in the Indian Territory, as hereinafter provided for, and subject to the setting apart as grazing lands for said Indians, four hundred and eighty thousand acres of land as hereinafter provided for, and subject to the conditions hereinafter imposed, and for the considerations hereinafter mentioned, the said Comanche, Kiowa, and Apache Indians hereby cede, convey, transfer, relinquish, and surrender, forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced in the following-described tract of country in the Indian Territory to wit: * * *

"ARTICLE II

"Out of the lands ceded, conveyed, transferred, relinquished, and surrendered by Article I hereof, and in part consideration for the cession thereof, it is agreed by the United States that each member of said Comanche, Kiowa, and Apache tribes of Indians over the age of eighteen (18) years shall have the right to select for himself or herself one hundred and sixty (160) acres of land to be held and owned in severalty, to conform to the legal surveys in boundary; and that the father, or, if he be dead, the mother, if members of either of said tribe of Indians, shall have the right to select a like amount of land for each of his or her children under the age of eighteen (18) years; and that the Commissioner of Indian Affairs, or some one by him appointed for the purpose, shall select a like amount of land for each orphan child belonging to either of said tribes under the age of eighteen (18) years.

"ARTICLE V

"When said allotments of land shall have been selected and taken as aforesaid, and approved by the Secretary of the Interior, the titles thereto shall be held in trust for the allottees, respectively, for the period of twenty-five (25) years, in the time and manner and to the extent provided for in the act of Congress entitled 'An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other

purposes,' approved February 8, 1887, and an act amendatory thereof, approved February 28, 1891.

"And at the expiration of the said period of twenty-five (25) years the titles thereto shall be conveyed in fee simple to the allottees or their heirs, free from all incumbrances.

"ARTICLE XI

"This agreement shall be effective only when ratified by the Congress of the United States."

Said agreement be, and the same hereby is, accepted, ratified, and confirmed as herein amended.

That the Secretary of the Interior is hereby authorized and directed to cause the allotments of said lands, provided for in said treaty among said Indians, to be made by any Indian inspector or special agent. * * *.

4. Act of May 8, 1906, c. 2348, 34 Stat. 182:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," be amended to read as follows:

"Sec. 6. * * * That the Secretary of the Interior may, in his discretion, and he is

hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, encumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent; * * *."

* * * * *

(25 U.S.C. 1946 ed., Sec. 349.)

5. Executive Order 7464, September 30, 1936, 1 Fed. Register, Part II, p. 1507:

By virtue of and pursuant to the authority vested in me by section 5 of the Act of February 8, 1887, * * * it is ordered that the periods of trust applying to any Indian lands, whether of a tribal or individual status, which, unless extended, will expire December 31, 1936, or during the calendar year 1937, be, and they are hereby, extended in each case for a further period of twenty-five years * * *.

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